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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEIL HARTIGAN
~~TYRONE C. FAHNER~~, ATTORNEY GENERAL OF ILLINOIS, CHARLES P. ZALAR, STATE'S ATTORNEY OF GRUNDY COUNTY, and PHILIP GUSTAFSON, DIRECTOR OF THE ILLINOIS DEPARTMENT OF NUCLEAR SAFETY,

Petitioners,

v.

GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the Illinois Spent Fuel Act, Ill. Rev. Stat. ch. 111½, §§ 230.21-.24, which was enacted to protect Illinois from the adverse economic consequences resulting from the absence of a national policy concerning nuclear waste disposal, authorized under section 274(k) of the Atomic Energy Act, 42 U. S. C. § 2021(k), and, if it is not, does the Atomic Energy Act violate the Tenth Amendment by interfering impermissibly with the right of Illinois to exercise control over its treasury?
2. Is the Illinois Spent Fuel Act, Ill. Rev. Stat. ch. 111½, §§ 230.21-.24, a valid exercise of state power under the Commerce Clause to prohibit the importation into Illinois of spent nuclear fuel, an inherently dangerous material?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit was entered on July 13, 1982 and is reported below as *Illinois* v. *General Electric Company*, 683 F. 2d 206 (7th Cir. 1982). The opinion of the District Court for the Northern District of Illinois is not officially reported.

Jurisdiction

This petition for certiorari is sought under 28 U. S. C. § 1254(1). The petition was filed within ninety days after the entry of judgment in the Court of Appeals on July 13, 1982, in conformity with Rule 20.2 of this Court.

Constitutional and Statutory Provisions Involved

This case involves the following constitutional and statutory provisions, the relevant portions of which are set forth in the Appendix:

United States Constitution, Amendment X;

United States Constitution, Article I, Section 8 (Commerce Clause);

United States Constitution, Article VI (Supremacy Clause);

Atomic Energy Act of 1954, as amended, 42 U. S. C. §§ 2011-2296 (Supp. IV 1980);

Spent Fuel Act, Ill. Rev. Stat. ch. 111½, §§ 230.21-.24 (1981).

STATEMENT

The issue presented in this case—state regulation of high level nuclear waste—is not likely to disappear. It will recur before this Court again and again. The nuclear power industry has grown rapidly and is now at a point where it constitutes a major source of energy for the Nation. This growth has produced a serious and alarming problem—the need to provide for the safe and secure disposal of spent nuclear fuel.

Irradiated nuclear fuel assemblies, which are the fuel source of nuclear power plants, eventually lose their ability to sustain a chain reaction sufficient to generate nuclear power. "Spent" fuel assemblies must be periodically removed from nuclear reactors and replaced with fresh fuel. When removed, spent fuel assemblies generate enormous amounts of heat and contain highly radioactive materials. Because of its high radioactivity, spent fuel, unlike ordinary garbage or other forms of hazardous waste, cannot be readily disposed of by burial in land or in the ocean, since it would release levels of radiation sufficient to kill all plant, animal, and oceanic life. Moreover, the radioactivity of spent fuel is extremely long-lived, and thousands of years must pass before the fuel can be safely released into the environment.

At present, there is no permanent method of disposing of spent fuel.[1] For the interim, most spent fuel is stored on-site at nuclear power plants throughout the Nation. The remaining spent fuel is stored away-from-reactor at a facility ("the Morris Facility") operated by Respondent General Electric Company ("General Electric") in Morris, Illinois. The Morris Facility is

[1] At one time, it was hoped that spent fuel would be reprocessed to recover certain remaining materials, primarily plutonium, that could be recycled into the generation process. Because plutonium is the major component of nuclear weapons, the federal government has imposed a moratorium on reprocessing spent fuel to avoid the dangers of proliferation of plutonium. *See Minnesota* v. *Nuclear Regulatory Comm'n*, 602 F. 2d 412, 414 (D. C. Cir. 1979).

the only commercial away-from-reactor spent fuel storage site in the United States. The Morris Facility was originally intended to serve as a reprocessing plant—not as a storage or disposal site for spent fuel. Because of its design and limited capacity, the Morris Facility is, at best, a temporary expedient for, not a permanent solution to, the national problem of spent fuel disposal.

Recognizing the inadequacies of the Morris Facility and the need for a national solution to the problem of disposing of spent fuel, Illinois enacted the Spent Fuel Act. Ill Rev. Stat. ch. 111½, §§ 230.21-.24 (1981). The Spent Fuel Act provides that spent nuclear fuel generated outside Illinois may not be transported into or stored in Illinois unless the state of origin has an away-from-reactor storage site and has entered into a reciprocity agreement with Illinois.

Respondents General Electric, operator of the Morris Facility, and Southern California Edison, operator of a nuclear generating facility in California planning to ship spent fuel to the Morris Facility, brought an action in the United States District Court for the Northern District of Illinois, seeking a declaration that the Spent Fuel Act was unconstitutional and an order restraining its enforcement. On the same day, Petitioner Tyrone C. Fahner, the Attorney General of Illinois, filed an action in the Circuit Court of Grundy County, Illinois under the Spent Fuel Act, other Illinois statutes, and the common law, seeking to enjoin Southern California Edison from transporting spent fuel into Illinois and General Electric from storing that spent fuel in Illinois. Respondents subsequently removed the state court action to the District Court, where it was consolidated with the federal action. Petitioner Fahner thereafter moved that the state court action be remanded to the Circuit Court of Grundy County. The District Court denied this motion.

Respondents then moved for summary judgment in both cases. The District Court granted summary judgment, holding that the Spent Fuel Act was preempted by the Atomic Energy

Act, 42 U. S. C. §§ 2011-2296, and invalid under the Commerce Clause. Petitioners appealed, challenging the final judgments in both actions and also the District Court's refusal to remand the state court action to state court.

The Court of Appeals for the Seventh Circuit affirmed the grant of summary judgment in the federal action and reversed the District Court's refusal to remand the state court action to state court.[2] In affirming the grant of summary judgment, the Court of Appeals held that the Spent Fuel Act was preempted by the Atomic Energy Act, 42 U. S. C. §§ 2011-2296, and violated the Commerce Clause. The decision of the Court of Appeals not only conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 659 F. 2d 903 (9th Cir. 1981), *cert. granted in part*, 102 S. Ct. 2956 (1982), but also overlooks the Tenth Amendment right of the states to regulate the nuclear industry in the exercise of their traditional governmental functions.[3]

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[2] Petitioners do not ask this Court to review the Court of Appeals' decision to remand the state court action to state court, but seek review only of the decision of the Court of Appeals sustaining the District Court's grant of summary judgment on the federal constitutional issues.

[3] Because this Petition draws into question the constitutionality of the Atomic Energy Act, 28 U. S. C. § 2403(a) may be applicable. Neither the District Court nor the Court of Appeals has, pursuant to section 2403(a), certified to the United States Attorney General the fact that the constitutionality of the Atomic Energy Act is drawn into question in this case.

REASONS FOR GRANTING THE WRIT

I.

STATES ARE UNCERTAIN AS TO THE SCOPE OF THEIR AUTHORITY OVER HIGH LEVEL NUCLEAR WASTE, BECAUSE THIS COURT HAS NOT ADDRESSED THE EXTENT TO WHICH THE ATOMIC ENERGY ACT PREEMPTS STATE LEGISLATION CONCERNING SUCH WASTE OR THE UNCONSTITUTIONALITY OF THE ATOMIC ENERGY ACT INSOFAR AS IT IS INTERPRETED TO IMPAIR TRADITIONAL STATE GOVERNMENTAL FUNCTIONS.

The problem of nuclear waste disposal is nationally important and must be addressed. The Nation is heavily dependent upon nuclear power as a source of energy, and, thus, proper disposal of the waste produced by that source of energy is a matter that vitally affects all citizens of this Nation. The problem is not, however, a problem that one state should bear or solve merely because Congress has not acted to provide a national solution. No state wants to be nor should be, by default, a "dumping ground" for the rest of the Nation's nuclear waste. It is a national problem, requiring a national solution.

The federal government has not yet found a solution to the problem of spent fuel disposal. As the Court of Appeals acknowledged, the Atomic Energy Act ("AEA") does not mention spent fuel. Nowhere in the AEA is there a program or even an approach to deal with nuclear waste disposal. Although regulations of the Nuclear Regulatory Commission ("NRC") address the licensing of facilities for the temporary storage of high level waste, they contain no program or policy relating to permanent disposal of such wastes. The reason for this is that Congress has never been able to agree on such a policy or program. Despite repeated efforts in the last five years to enact legislation designed to deal with the problem of the

permanent disposal of nuclear waste, Congress has not yet adopted such legislation.[4]

Unless this Court reverses the Court of Appeals' interpretation of the AEA and the Commerce Clause as they relate to the permissible scope of state regulation of spent fuel transportation and storage, Illinois stands to be uniquely prejudiced by the lack of a national policy on nuclear waste disposal. If the Court of Appeals is correct, and Illinois cannot restrict out-of-state use of the Morris Facility until a permanent disposal solution is established at the national level, then a predictable course of events is likely to force Illinois to commit its resources and funds, in massive amounts and in perpetuity, to the care and maintenance of the Morris Facility.

If Illinois must allow utility companies throughout the entire Nation to transport their spent fuel to the Morris Facility rather than retaining it in at-the-reactor storage facilities until a permanent disposal facility is available, the capacity of the Morris Facility will be exhausted in the very near future. When that occurs, Respondent General Electric, the operator of the Morris Facility, will no longer have an economic incentive to maintain and manage the facility and, if history is a reliable indicator of the future, will likely abandon it.[5] Illinois will then

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[4] *See, e.g.*, S. 63, 95th Cong., 1st Sess., 123 CONG. REC. 447 (1977); H.R. 14323, 95th Cong., 2d Sess., 124 CONG. REC. 37,170 (1978); S. 594, 96th Cong., 1st Sess., 125 CONG. REC. 4416 (1979); S. 2189, 96th Cong., 2d Sess., *cited in* 1980 CONG. Q. ALMANAC 494-502; S. 95, 97th Cong., 1st Sess., 127 CONG. REC. S140-48 (daily ed. Jan. 15, 1981); S. 1662, 97th Cong., 2d Sess., 128 CONG. REC. S2851 (daily ed. Mar. 25, 1982).

[5] Abandonment of nuclear and other hazardous waste disposal sites by private operators is a common occurrence. A low-level nuclear waste site in Sheffield, Illinois was abandoned by its private operator in 1979, and litigation filed to protect the people of Illinois from the environmental and economic consequences is still far from resolved. New York and Kentucky have experienced similar problems at the West Valley and Maxey Flats disposal sites. Similar occurrences involving non-nuclear hazardous wastes have been recorded across the Nation.

be left with the difficult and expensive task of managing and maintaining the facility, a task that could very well bankrupt the State's treasury. Illinois will be forced to expend state funds to provide highly skilled around-the-clock technical, maintenance, and security personnel and to maintain a highly complex facility, containing extremely technical and expensive equipment. The cost of state government would rise dramatically and threaten the ability of Illinois to meet the needs of its residents.

To avoid the strain on the state budget and resources that abandonment would cause, Illinois has imposed reasonable restraints on the use of the Morris Facility to ensure that the storage space at that facility will not be exhausted before a permanent disposal site is available. Only in this way can Illinois assure that General Electric will have an economic interest in maintaining the site until a permanent disposal site is designated, and the spent fuel now stored at the Morris Facility and at nuclear reactors around the Nation can be transferred to that site.

The preemption issue in this case is, then, whether the AEA should be interpreted, as the Court of Appeals implicitly concluded, as a Congressional decision to foist upon one state, through national neglect, the entire burden of nuclear waste disposal or whether the AEA should be interpreted to allow individual states to take the steps necessary, pending the adoption of a national policy, to avoid the potentially devastating economic consequences of becoming a national dumping ground for high level nuclear waste. The decision of the Court of Appeals, sustaining the former interpretation, is not only inconsistent with the express language of the AEA, but also renders the AEA unconstitutional under the Tenth Amendment.

A.

The Illinois Spent Fuel Act Is Not Preempted by the Atomic Energy Act, Because Its Purpose Is Not to Regulate Radiation Hazards. The Decision of the Court of Appeals in This Case Is in Direct Conflict With the Decision of the Court of Appeals for the Ninth Circuit in the *Pacific Gas & Electric Co.* Case.

Contrary to the opinion of the Court of Appeals for the Seventh Circuit (App. 16a), Illinois can, and does, "quarrel" with that Court's analysis of the preemption issue presented in this case. The Court of Appeals concluded erroneously that the AEA's grant of authority to the NRC to license spent fuel storage facilities necessarily precludes Illinois from regulating the storage of spent fuel. In so holding, the Court of Appeals ignored Section 274(k) of the AEA, which specifically allows states to regulate nuclear power in some circumstances:

> Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

42 U. S. C. § 2021(k) (1976).

The intent of Congress in enacting section 274(k) was "to make it clear that the [AEA] does not impair the State authority to regulate activities of AEC licensees for the manifold health, safety, and economic purposes other than radiation protection." S. Rep. No. 870, 86th Cong., 1st Sess., *reprinted in* 1959 U. S. Code Cong. & Ad. News 2872, 2882. Indeed, several courts have so construed section 274(k) and have upheld state regulation of nuclear activities aimed at state purposes other than radiation hazards. *Illinois* v. *Kerr-McGee Chemical Corp.*, 677 F. 2d 571 (7th Cir. 1982); *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 659 F. 2d 903 (9th Cir. 1981), *cert. granted in part*, 102 S. Ct. 2956 (1982). *See also Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143, 1150 (8th Cir.

1971), *aff'd mem.*, 405 U. S. 1035 (1972) (state regulation of radiation hazards preempted, but section 274(k) held to allow regulation of matters other than radiation hazards).

The Court of Appeals ignored the express language of section 274(k) and the legislative history of the Spent Fuel Act. That legislative history reveals that the purpose of the Act was not to regulate radiation hazards, but to respond to Illinois' concern for its economic well-being in view of the lack of a federal policy to solve the nuclear waste disposal problem. Underlying that concern was the legislators' belief that the government and taxpayers of Illinois, the situs of the Nation's only commercial away-from-reactor nuclear storage facility, should not have to bear the present and potential economic burden of the entire Nation's nuclear waste, as a result of national neglect. That this concern is a legitimate State concern justifying state legislative response is supported by a recent decision of the Court of Appeals for the Ninth Circuit.

The Ninth Circuit in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 659 F. 2d 903 (9th Cir. 1981), *cert. granted in part*, 102 S. Ct. 2956 (1982), construed a California statute that imposed a moratorium on certification of all nuclear plants in California until the California Energy Commission determined that a federally-approved method of disposing of nuclear wastes existed. Upon examining the legislative history of the California statute, the Ninth Circuit found that the concern of the California legislators was the lack of a federally-approved method of disposing of nuclear waste. The legislators deemed this problem to be " 'largely economic or the result of poor planning, *not* safety related,' " and did not directly address the issue of waste disposal *safety*, but " 'ask[ed] only that a method [of waste disposal] be chosen and accepted by the federal government.' " 659 F. 2d at 924-25 (quoting California Assembly Committee on Resources, Land Use & Energy, *Reassessment of Nuclear Energy in California* 154-55) (emphasis in original). The Ninth Circuit held that the California

statute was aimed at purposes other than protection against radiation hazards and was, thus, not preempted by the AEA, but was expressly authorized under section 274(k).

Since the Illinois Spent Fuel Act was enacted for the same purpose as the California statute, under the Ninth Circuit's interpretation of the AEA, the Spent Fuel Act is not preempted by the AEA, but is expressly authorized by section 274(k) of that Act. The Seventh Circuit, however, held that the Spent Fuel Act is preempted by the AEA. There is, thus, a direct conflict between the Courts of Appeal on the issue presented in this case, a conflict that only this Court can resolve. This Court has granted *certiorari* in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission,* 102 S. Ct. 2956 (1982), and should also grant *certiorari* in this case.

B.

The Court of Appeals' Interpretation of the Atomic Energy Act Interferes Unconstitutionally With the Right of the State of Illinois to Control Its Treasury, a Traditional and Integral State Governmental Function.

The Court of Appeals' interpretation of the AEA renders the AEA unconstitutional under the Tenth Amendment.[6] The failure of Congress to enact a nuclear waste disposal policy, when combined with the Court of Appeals' interpretation that Congress intended the AEA to preempt the Spent Fuel Act, deprives Illinois of the right to protect its treasury from reasonably predictable catastrophic obligations. In enacting the Spent Fuel Act, Illinois sought only to stem the flow of spent fuel to the Morris Facility so as to reduce the risk of early abandonment or other problems at that facility that could have immediate adverse effects on the financial well-being of the state.

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[6] This Court need not, of course, reach the issue of the constitutionality of the AEA if it interprets the AEA consistently with the express language of section 274(k) of the AEA and finds that the Spent Fuel Act is not preempted.

The practical effect of the Court of Appeals' decision, coupled with Congress' failure to provide a permanent solution to the high level nuclear waste disposal problem, is that Congress has determined that high level nuclear waste disposal is a complex problem with no ready solution and has at the same time passed a law to prevent Illinois from taking action to control the dumping of such waste into Illinois for "temporary" storage in a facility never intended to be a permanent disposal site. The consequence of Congressional action—the AEA—and inaction—the the lack of a policy on nuclear waste disposal—is that the taxpayers and treasury of Illinois are held at ransom by a national problem. If Congress can force Illinois to mortgage its future and gamble its treasury on the hope that a national disposal policy will be established before problems develop at the Morris Facility and can preclude Illinois from prohibiting the national dumping of high level waste at the Morris Facility, then Illinois can no longer control its own treasury or its own destiny.

The Tenth Amendment was designed to prevent Congress from so totally eroding the sovereignty of a state. *See National League of Cities* v. *Usery*, 426 U. S. 833, 840-852 (1976); *District of Columbia* v. *Train*, 521 F. 2d 971, 994 (D. C. Cir. 1975), *vacated sub nom., EPA* v. *Brown*, 431 U. S. 99 (1977). More specifically, the Tenth Amendment prohibits Congress from "impair[ing] the States' integrity or their ability to function effectively in a federal system." *Fry* v. *United States*, 421 U. S. 542, 547 n. 7 (1975). As this Court said in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U. S. 264, 286-87 (1981) (quoting *National League of Cities*, 426 U. S. at 845:

> [W]hen Congress attempts to regulate the States as States the Tenth Amendment requires recognition that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."

The right of a state to protect its treasury has traditionally and historically been recognized as one of the essential elements of the state sovereignty. *National League of Cities,* 426 U. S. at 845-52. Without this power, a state would lack the ability to implement decisions, policies, and programs, and its decisionmaking power—"what gives the State its sovereign nature"—would be meaningless. *FERC* v. *Mississippi,* 102 S. Ct. 2126, 2138 (1982). Congress cannot, by its failure to enact nuclear waste disposal legislation and its preemption of the Spent Fuel Act, displace the power of Illinois to make decisions affecting its treasury. If it could, there would be "little left of [Illinois'] 'separate and independent existence.'" *National League of Cities,* 426 U. S. at 851 (quoting *Lane County* v. *Oregon,* 74 U. S. (7 Wall.) 71, 76 (1869). The Tenth Amendment does not sanction this result, and the Court of Appeals' interpretation of the AEA to reach this result renders the AEA unconstitutional.

II.

THE SPENT FUEL ACT IS A VALID EXERCISE OF STATE POWER UNDER THE QUARANTINE CASES TO PREVENT SPENT NUCLEAR FUEL, AN ENVIRONMENTALLY DANGEROUS ARTICLE, FROM CROSSING ILLINOIS BORDERS.

This Court has made it clear that the Commerce Clause permits a state to establish a quarantine against the importation of environmentally noxious and unsafe articles. *Clason* v. *Indiana,* 306 U. S. 439 (1939) (diseased animals); *Sligh* v. *Kirkwood,* 237 U. S. 52 (1915) (immature citrus fruit); *Asbell* v. *Kansas,* 209 U. S. 251 (1908) (diseased cattle); *Reid* v. *Colorado,* 187 U. S. 137 (1902) (diseased animals). Justice Matthews' opinion in *Bowman* v. *Chicago & Northwestern Ry. Co.,* 125 U. S. 465, 489 (1888), sets forth the quarantine doctrine accurately and completely:

> Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution.

The right to ban environmentally noxious articles is a "right founded . . . in the sacred law of self-defence." *Hannibal & St. Joseph R.R.* v. *Husen,* 95 U. S. 465, 471 (1877). Certainly, no one would contest Illinois' assertion that nuclear waste presents a grave hazard to its environment, not only in storage, but also in transport.

The Court of Appeals concluded erroneously that this case is governed, not by the quarantine cases, but by *City of Philadelphia* v. *New Jersey,* 437 U. S. 617 (1978). In that case, this Court struck down as violative of the Commerce Clause a New Jersey statute prohibiting out-of-state residents from using New Jersey landfill sites to dispose of ordinary garbage. This Court distinguished the New Jersey statute from the quarantine cases on the ground that New Jersey could not claim that there is danger in transporting garbage, because there is none. Ordinary garbage is not inherently dangerous, and its very movement does not pose any danger to the environment. Nothing about ordinary garbage suggests that the risks of transport are so high as to require storage or disposal to the point of origin as possible.

By contrast, the articles in the quarantine cases were inherently dangerous, and the very movement of those articles would have increased the risk of spreading disease, infection, and pestilence, principally because of the inability to contain the disease, germ, or infection in the event of an accidental release into the environment. For this reason, the quarantine cases sanctioned laws designed to encourage disposal of such articles near the point of origin and to discourage their movement in commerce.

These same considerations apply to spent nuclear fuel with even more force. Spent nuclear fuel is unquestionably inherently dangerous, and the very movement of such fuel poses a serious, uncontrollable environmental hazard. Accident, sabotage, or carelessness could easily result in the leakage of lethal and environmentally destructive radioactive material. Once released into the environment, radioactivity cannot be controlled or contained. For these reasons, spent fuel, like the quarantined articles, should be stored as close to the point of origin as possible until a national permanent disposal policy is adopted. The movement of spent fuel away from reactors, and the transportation, handling, and rehandling that that movement necessitates, should be discouraged until the fuel can be moved once and for all to a permanent disposal site. Spent fuel assemblies—even more so than diseased animals and infected rags—deserve no recognition as "legitimate subjects of trade and commerce." *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 489 (1888). Spent nuclear fuel, therefore, resembles the inherently dangerous quarantined articles, not ordinary garbage. The Court of Appeals' reliance on this Court's opinion in *City of Philadelphia* to reach a contrary conclusion is misplaced and incorrect.

In enacting the Spent Fuel Act, Illinois was concerned with the hazards of the transport and handling, as well as those of the storage, of spent fuel. The Spent Fuel Act does permit intrastate shipment, but so did the quarantine cases. Spent fuel, like the noxious articles in the quarantine cases, should be disposed of as close as possible to the point of generation to

avoid as much transportation as possible. Illinois is a major generator of spent fuel, and it is reasonable to expect Illinois to use all available Illinois resources to solve the problem of disposing of spent fuel. The allowance of intrastate shipments is not evidence of a lack of concern for the hazards of shipment, but is merely a recognition of the reality of the situation and evidence of a desire to accommodate, within that reality, the concern for disposing spent fuel as close as possible to the point of generation. The laws sustained in the quarantine cases were no different.

The principle to be drawn from the quarantine cases is that a state may deal with the problem of its own noxious environmental hazards as best it can, but need not be, and may not be forced to be, a dumping ground for the entire Nation. To deny Illinois the right to close its borders to the environmental hazards of spent fuel would simply permit other states and their utility companies to refuse to address the problem of such hazards by allowing them to follow the cheap and expedient route of dumping those hazards in Illinois. Such a result is surely not necessary to foster interstate commerce and could not have been what the Framers intended to encourage by adopting the Commerce Clause.

CONCLUSION

Petitioners respectfully request that, for the reasons heretofore adduced, this Court issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit and reverse the judgment below.

Respectfully submitted,

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Appendix 1

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-2768

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,

Defendants-Appellees.

No. 81-2778

GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,

Plaintiffs-Appellees,

v.

TYRONE C. FAHNER, Attorney General of Illinois, CHARLES ZALAR, State's Attorney of Grundy County, and PHILIP GUSTAFSON, Director of the Department of Nuclear Safety,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 81-C-0461, 80-C-6835—Frank J. McGarr, *Judge.*

ARGUED MAY 25, 1982—DECIDED JULY 13, 1982

Nos. 81-2768 & 81-2778

Before WOOD and POSNER, *Circuit Judges*, and FOREMAN, *Chief Judge*.*

POSNER, *Circuit Judge*. These consolidated appeals present questions of federal jurisdiction and constitutional law arising out of an attempt by the State of Illinois to prevent the shipment of spent nuclear fuel into the state for storage.

The fuel for nuclear electric-power reactors—enriched uranium—becomes depleted after a few years in the reactor and has to be replaced. Because the spent fuel is highly radioactive and its radioactivity very long-lived, the question what to do with it is a troublesome one. The spent fuel cannot just be thrown away, because wherever it is thrown will be contaminated. It used to be thought that the spent fuel would be reprocessed to make new fuel; but reprocessing of nuclear fuel has become intensely controversial and its prospects currently are uncertain. At the moment, then, spent nuclear fuel has to be stored indefinitely. But there is as yet no acceptable method of permanent, safe storage; and meanwhile the spent fuel is being stored for the most part in "swimming pools" at the reactor sites. However, some reactors may run out of on-site storage space by the middle of this decade.

The only away-from-site facility in the United States that is accepting spent nuclear fuel for storage is General Electric's facility at Morris, Illinois, sixty miles southwest of Chicago. Spent fuel from reactors both within and outside Illinois is stored at the Morris facility. But in December 1980 Illinois enacted the Spent Fuel Act, Ill. Rev. Stat. ch. 111½, § 230, which provides that "no person may dispose of, store, or accept any spent nuclear fuel which was used in any power generating facility located outside this State, or transport into this State for disposal or storage any spent nuclear fuel which was used in any power generating facility located outside this State . . . ." § 230.22. The Act makes an exception for imports of spent nuclear fuel from states

* Of the Southern District of Illinois.

that have a storage facility like Illinois' and have entered into a reciprocity agreement with Illinois, but it is a meaningless exception because, as mentioned, there is no other facility in the United States that is accepting spent nuclear fuel for storage away from the reactor site. The Act imposes a civil penalty of $10,000 per violation—$1,000 per day for a continuing violation—and also authorizes state officials to bring suits to enjoin violations. §§ 230.23, 230.24.

Three weeks after the passage of the Act, General Electric, joined by an out-of-state utility, Southern California Edison, which had shipped spent nuclear fuel to the Morris facility in the past and had a contract to ship additional amounts beginning early in 1981, brought suit in federal district court under 28 U.S.C. § 2201 (Declaratory Judgment Act) and 28 U.S.C. § 1331 (federal-question jurisdiction) against the state officials responsible for enforcing the Spent Fuel Act. The suit sought a declaration that the Act violates the supremacy and commerce clauses of the U.S. Constitution. Just a few hours after this suit (No. 81-2778 on our docket) was filed, the Attorney General of Illinois brought a suit (No. 81-2768) in state court under the Illinois Spent Fuel Act and other Illinois statutes and the common law to enjoin Southern California Edison from shipping spent nuclear fuel into Illinois and General Electric from receiving it. The defendants removed the state's suit to federal court, where it was consolidated with the federal suit, and moved for summary judgment in both suits. The motion was granted. The state has appealed, challenging the final judgment in both cases and also the district court's refusal to remand No. 81-2768 to the state court.

The district court erred in not remanding No. 81-2768. The removal of a state court action to federal court is authorized only if the cause of action arises under federal law, see 28 U.S.C. § 1441, and the cause of action in No. 81-2768 did not; it arose under Illinois law. The fact that Illinois law may be unconstitutional as applied to the defendants' activities is a matter of defense, not a ground for removal, even if the defend-

ants show that the state laws sued on by the plaintiff are totally preempted by federal law. *Illinois v. Kerr-McGee Chem. Corp.*, No. 81-1110 (7th Cir. May 4, 1982).

The state argues that there also is no federal jurisdiction over No. 81-2778. It says, first, that the companies failed to allege an actual controversy within the meaning of Article III of the Constitution and the Declaratory Judgment Act. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-74 (1950). When the companies' suit was filed the state had not brought its suit, and it argues that until that happened no one could be certain that the Spent Fuel Act would actually affect the Morris facility.

It might appear to be a matter of indifference, or at most a technical defect readily curable by amending the complaint, whether there was an actual controversy when the federal suit was filed or not until a few hours later, when the state suit was filed. But it could make a difference, even a practical one. If there was no federal jurisdiction until the state suit was filed, the state's argument, discussed later in this opinion, that even if the federal court had jurisdiction it should have abstained from exercising it might be strengthened. More important, the mere fact that the state sought injunctive relief against a threatened violation of the Act by the companies would not necessarily establish an actual controversy in the Article III sense; not being bound by Article III a state might allow a suit to be maintained in its courts though there was no actual controversy in that sense. Finally, technicality though it may be, there is considerable doubt, to say the least, whether a federal court can acquire jurisdiction retroactively. *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379, 381-82 (1884), holds that it cannot. If there was no jurisdiction when the complaint was filed the federal court had no power to act—even, perhaps, to the extent of allowing the complaint to be amended when a basis for federal jurisdiction came into being.

But we need not pursue these byways further in this case, because there was, we think, federal jurisdiction at the moment the federal complaint was filed, even though the filing of the state complaint came later. To consti-

tute an actual controversy "the disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effects its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 244 (1952). The disagreement between the state and the companies was not "nebulous or contingent" when the federal complaint was filed. The complaint alleged that Southern California Edison was about to ship spent nuclear fuel from California to the Morris facility. That shipment, and General Electric's receipt of it, would have been in patent violation of the statute and would have made the companies liable to pay heavy civil penalties. Of course the companies could have gone ahead and violated the law and then have set up its alleged unconstitutionality as a defense in any civil penalty or other enforcement action brought by the state—in No. 81-2768, for example. But that is true with any statute alleged to be unconstitutional: you can violate it and then defend your conduct in state court on constitutional grounds. If it followed that there was no actual controversy until a violation occurred, the federal courts would never have jurisdiction to enjoin the threatened enforcement of state legislation alleged to violate the Constitution (except possibly at the behest of someone who had violated the statute but not yet been prosecuted for the violation)—a proposition that cannot be maintained in the face of *Ex parte Young*, 209 U.S. 123 (1908), and innumerable cases following it. See, e.g., *Lake Carriers Ass'n v. McMullan*, 406 U.S. 498, 506-08 (1972); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Supreme Court of Va. v. Consumers Union of the U.S.*, 446 U.S. 719, 737 (1980).

It is true that where as in this case enforcement is merely threatened, a dispute may in fact lack sufficient concreteness and inevitability to be deemed an actual and not merely hypothetical controversy; it may be "unripe." In limiting the jurisdiction of the federal courts to "cases or controversies" Article III has been understood to express a policy, one that makes especially good sense in regard to constitutional adjudication, against rendering judgments that are either un-

necessary to resolve a real dispute or unlikely to be made in a competent fashion. When a suit is brought against a state before the state has actually done anything to the plaintiff, not only may the suit not be necessary to protect the plaintiff's interests—because the state may never in fact do anything to him—but the lack of an immediate conflict may deprive the court of the facts it needs to make an informed decision; it may also—a related point—reduce the parties' incentives to make a real contest of the case. See, e.g., *Regional Rail Reorganization Cases*, 419 U.S. 102, 143-45 (1974). So if it were uncertain whether the Spent Fuel Act really was applicable to the Morris facility, or to Southern California Edison's shipment of spent nuclear fuel to the facility, or whether Southern California Edison was really planning to ship spent nuclear fuel to Morris in the near future, or whether the state would actually enforce the statute, we might well conclude that there was no actual controversy between the state and the companies when they brought the suit.

The case would then be like *Wycoff*, *supra*, see 344 U.S. at 244, or our circuit's recent decision in *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 252-53 (7th Cir. 1981). The Attorney General of Illinois had announced at a press conference that he intended to bring lawsuits against violators of Illinois' environmental protection laws, and one of those violators, he said, was Nuclear Engineering Company, which operated a facility for storing hazardous wastes. A few days after the press conference the company sued the state in federal court, alleging that the Illinois laws in question could not constitutionally be applied to its facility. This court held that the threat of enforcement did not create an actual controversy between the state and the company. Nuclear Engineering was not challenging the validity of the state laws that the Attorney General was seeking to enforce against it. On the contrary, it claimed to be in full compliance with them, and if so it had nothing to fear from the carrying out of the Attorney General's threat—it was not a present or prospective violator. If the threat itself had had an adverse impact on Nuclear Engineering's business this might have created an actual

controversy between it and the state, but the court's "careful examination of the record . . . reveal[ed] not a shred of evidence in support of NEC's allegation of immediate business injury." *Id.* at 252. The company was asking the federal court for an advisory opinion that if the Illinois laws were construed—incorrectly in the company's view—in such a way as to force it to close its hazardous waste facility, the state would be violating the Constitution.

The present case is different. Not only is it certain that General Electric and Southern California Edison would be violating the Spent Fuel Act if Southern California Edison shipped spent nuclear fuel to Morris, as it intended (but for the state law) to do; but as the Act has only one conceivable target—the Morris facility—it is extremely unlikely that the state would overlook the violation. Adverse legal action was a distinct possibility when Nuclear Engineering filed its suit but it was a virtual certainty when General Electric and Southern California Edison filed theirs. While the difference is one of degree rather than of kind, it is enough we think to show that the controversy between the state and the companies in this case has real and immediate and not merely hypothetical or remote consequences for them.

The state makes the related jurisdictional argument that the companies' cause of action did not arise under federal law, as required for federal jurisdiction under 28 U.S.C. § 1331, the statutory basis of federal jurisdiction in this case. (The complaint also alleges diversity of citizenship, treating the named defendant, the Attorney General of Illinois, as a citizen of Illinois within the meaning of 28 U.S.C. § 1332; but the companies reserve rather than argue this basis for federal jurisdiction on this appeal, in view of its rejection in *Nuclear Engineering, supra*, 660 F.2d at 250-51.)

In *Nuclear Engineering*, after the company brought its suit the Attorney General of Illinois carried out his threat and sued the company. That created, in this court's view, an actual controversy and the court proceeded to consider whether there was a statutory basis for federal jurisdiction over it. Purists might consider

this part of *Nuclear Engineering* an advisory opinion (the court having held it had no jurisdiction), but however that may be its teaching is inapplicable to the present case. Since the only thing that created an actual controversy in *Nuclear Engineering* was the filing of the state's lawsuit, it seemed to this court that any federal suit which Nuclear Engineering might subsequently have filed would just have been an attempt to raise in federal court its federal defenses to the state court action. See 660 F.2d at 253-54. The company could not argue that its rights were being infringed by a state law that was inconsistent with one or more provisions of the Constitution, because it did not contend that the state law was invalid, and in any event it claimed to be complying with that law. All it could plead in its federal complaint was that *if* the state court accepted the Attorney General's proposed construction of state law, that law would violate its constitutional rights. The conditional assertion of a federal right is in reality the assertion of a federal defense. If this could be the basis of a federal suit, the rule mentioned earlier that forbids the removal of a state suit to federal court on the basis of a federal defense to that suit would be circumvented. But in the present case the companies are claiming an unconditional right under the Constitution to ship spent nuclear fuel into, and to receive it in, Illinois for storage notwithstanding the Spent Fuel Act. They can vindicate that right in a suit under section 1331. The commerce and supremacy clauses of the Constitution create rights enforceable in equity proceedings in federal court. See, e.g., *Lake Carriers' Ass'n*, *supra*, 406 U.S. at 502-03; *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

There is, it is true, a dictum in the *Wycoff* case, *supra*, which if it is the law could put the plaintiffs in this case right out of court: "Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court." 344 U.S. at 248. The impending state court action here was based on an alleged violation of state rather than federal law. Now at one level the dictum is an innocuous if perhaps

overbroad statement of the principle that you cannot get around the limitations on the removal jurisdiction of the federal courts by asserting your defenses in a federal declaratory judgment action. But at another level, if understood to require federal claimants always to litigate their claims as defenses in state court if they can, it must be wrong, and though lower federal courts have followed it from time to time the Supreme Court has not. For a perceptive discussion see Note, *Federal Jurisdiction over Declaratory Suits Challenging State Action*, 79 Colum. L. Rev. 983 (1979). Since the impending state action will almost always be based on state law alone, the dictum, read broadly, would overrule *Ex parte Young* and every case that has ever followed it. If not wrong, such a reading would still be an inappropriate flight of fancy for an inferior federal court to take.

Still, the companies here could, and did, raise their constitutional claims in defense of the state court action brought by the Attorney General; and the state argues, as an alternative ground for dismissal of the federal suit, that the district court, even if it had jurisdiction, should have abstained from exercising it and forced the companies to litigate exclusively in the state courts. There must be something wrong with this argument, because if it were accepted it would prevent people from ever challenging the constitutionality of state legislation in federal court. Every time someone brought a suit to have a state law declared unconstitutional the state would immediately file an action in state court to enjoin violation of the statute and then move the federal district court to stay or dismiss the federal suit, thereby forcing the federal plaintiff to litigate his federal claims by way of defense in the state court action. If to avoid being forced into state court in this way the federal claimant violated the statute and then brought a federal suit to enjoin its enforcement, his suit would almost certainly be dismissed under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971)—that federal courts ordinarily will not interfere in pending state prosecutions—provided only that the state brought some sort of enforcement proceeding before the federal suit was well advanced, see *Hicks v. Miranda*, 422 U.S. 322, 349

(1975). For the term "prosecution" has been broadened to include civil enforcement actions, clearly including the type of civil penalty suit that the state could have brought under the Spent Fuel Act if General Electric and Southern California Edison had gone ahead and violated the Act. See, e.g., *Trainor v. Hernandez*, 431 U.S. 434, 443-44 (1977); *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 50 U.S.L. Wk. 4712 (S. Ct. June 21, 1982).

The state is unable to cite any precedent for the contraction of federal jurisdiction that it is advocating. *Hicks v. Miranda*, *supra*, on which the state relies heavily, holds only "that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of [*Younger*] should apply in full force." The plaintiffs in *Hicks* had already violated the statute; that was what exposed them to state criminal prosecution. *Younger* holds that the state's interest in enforcing its laws without interference from a federal court takes precedence over the federal claimant's interest in litigating his claim in a federal forum. But the federal plaintiffs in the present case did not violate state law, so the state could not have brought a penalty action against them. The state's interest in maintaining law and order through enforcement of its penal statutes was not impaired by the federal lawsuit and the principle of the *Younger* case is therefore inapplicable. It is not the order of the suits that is important to the *Younger* doctrine but whether a state statute has been violated and the violator is being sued in state court.

The state also cites *Louisville Area Inter-Faith Comm. for United Farm Workers v. Nottingham Liquors, Ltd.*, 542 F.2d 652 (6th Cir. 1976). The defendant had obtained a temporary restraining order in state court against picketing by the plaintiff union. Rather than ask the state court to dissolve the order the union brought a federal suit to enjoin its enforcement as a violation of the union's First Amendment rights. The federal district

court dismissed the suit and the court of appeals affirmed. The court of appeals cited the *Younger* case—which is a bit surprising, since the state was not a party to the state court suit that the plaintiff in *Nottingham* was trying to enjoin—but did not hold that federal courts as a general rule will not exercise jurisdiction in a case where the plaintiff could raise his federal claim in a pending state court proceeding. The state judge who had issued the temporary restraining order was the logical person to consider, in the first instance at least, the union's claim that the order should be dissolved; judicial economy therefore required that the federal court stay its hand until the union applied to the state judge to dissolve his order. There is nothing like that in the present case. No state suit had even been filed when the federal suit was filed, let alone had proceeded to the point where the exercise of federal jurisdiction would have interrupted an active state court litigation.

In essence the state is asking us to adopt a rule of abstention that whenever parallel state and federal suits are pending, the federal suit must be stayed and the federal claimant remitted to state court. The cases do not support such a rule, and it would be hard to square with 28 U.S.C. § 1331(a), which explicitly grants the federal courts jurisdiction over civil suits arising under the Constitution. In every case that the state has cited the federal claimant had gone ahead and violated state law, thereby bringing into play the state's interest in redressing violations of its laws in its own courts. The message of *Younger* and of the recent cases that have expanded its principle to civil proceedings is that one who decides to violate a state law that he believes to be unconstitutional may find that he has thereby submitted himself to the jurisdiction of the state courts. Only if he goes to court before violating the law can he be assured of a federal forum, and then only if he satisfies the stringent jurisdictional requirements, discussed earlier in this opinion, for bringing a federal suit to enjoin merely threatened state enforcement action. If the state's position were correct, virtually no federal suit could ever be brought to challenge the constitutionality

of a state statute, at least if the statute was enforceable by the state itself. The state, upon learning that a federal suit had been filed, would have only to bring its own declaratory or injunctive suit to force the federal court to abstain from exercising jurisdiction. While there are arguments in favor of this result, for among other things it is unseemly to allow a single federal district judge to enjoin a state statute, it would be too radical a break with precedent to be decreed by a lower court.

The principle of *Younger* is of course only one part of the abstention doctrine. *Nottingham* illustrates another. When the constitutionality of a state statute depends on how the statute is construed, there is a third ground for abstention; but in the present case, as in *Zwickler v. Koota*, 389 U.S. 241, 249 (1967), the statute is unambiguous and—as we are about to see—no saving construction is possible.

We come at long last to the merits. General Electric and Southern California Edison challenge the constitutionality of the Spent Fuel Act on two grounds. The first is that it violates the commerce clause because it discriminates against interstate commerce. There is no dispute that the Spent Fuel Act applies only to spent fuel brought in from other states and that the Morris facility stores spent nuclear fuel from nuclear reactors located in Illinois as well as from out-of-state utilities such as Southern California Edison; in fact about half the spent fuel currently being stored comes from reactors in Illinois. However compelling the state's interest in safeguarding its residents from the hazards of radioactivity, that interest is unaffected by the origin of the radioactive material. Even if it is the movement rather than the storage of the spent nuclear fuel that is the source of the hazards about which the state is concerned, all spent nuclear fuel stored in the Morris facility was brought there from somewhere else yet the statute does not limit or forbid any intrastate movements, however lengthy or hazardous, nor even interstate movements so long as they do not end up at the Morris facility.

To pass laws that arbitrarily burden interstate commerce, by forbidding shipments merely because they originate out of state, violates the commerce clause, see, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 336-37 (1979), and it is irrelevant that the traffic is in "bads" rather than goods. The efficient disposal of wastes is as much a part of economic activity as the production that yields the wastes as a byproduct, and to impede the interstate movement of those wastes is as inconsistent with the efficient allocation of resources as to impede the interstate movement of the product that yields them. If Illinois may not arbitrarily prevent the importation of electricity generated by nuclear reactors in other states, or of nuclear fuel to power its own reactors, no more may it arbitrarily prevent the waste products of nuclear electricity generation from being imported for storage in the state. Nuclear wastes have to be stored somewhere, and the place of storage should be chosen without regard to the parochial interests of the states.

Yet contrary to what we have just said some early cases, the "quarantine cases" on which the state heavily relies, treat interstate commerce in "bads" as not commerce at all, see, e.g., *Bowman v. Chicago & Nw. Ry.*, 125 U.S. 465, 489 (1888), and thus hold that a state has a right to ban the importation of "convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded . . . in the sacred law of self-defense." *Hannibal & St. Joseph R.R. v. Husen*, 95 U.S. 465, 471 (1878). See also *Asbell v. Kansas*, 209 U.S. 251 (1908) (diseased cattle). *Shapiro v. Thompson*, 394 U.S. 618 (1969), which forbids the states to deny welfare benefits to new residents, casts a big shadow over *Husen*; but *Shapiro* is a fourteenth amendment "right to travel" case, not a commerce clause case (though there are glancing references in the opinions to a right to travel based on that clause, see 394 U.S. at 630 n.8, 666), and in any event does not apply to a nonhuman import, such as spent nuclear fuel.

The quarantine cases are helpful to the State of Illinois because the Supreme Court did not ask whether the state was treating intrastate "bads" the same way it was treating interstate ones. But maybe it did not ask because it thought the answer obvious. A state that bans the importation of paupers or diseased cattle probably does not do so out of affection for its local paupers and diseased cattle. The hostility is to the thing itself, not to merely interstate shipments of the thing; and an undiscriminating hostility is at least nondiscriminatory. But that is not the case here. The State of Illinois is quite willing to allow the storage and even the shipment for storage of spent nuclear fuel in Illinois, provided only that its origin is intrastate.

This case is governed not by the quarantine cases but by *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which held that New Jersey could not confine the use of its landfill waste dumps to New Jersey residents. The Court did distinguish the quarantine cases by stating that New Jersey's objection was not to the shipment but to the storage of wastes, see *id.* at 628-29, and the State of Illinois seizes on this distinction and argues that it does object to the shipment as well as storage of spent nuclear fuel. Its objection is unconvincing because it allows intrastate shipments, and even interstate shipments so long as they are not for the purpose of storage in Illinois. But a more satisfactory basis of distinction is, as we have suggested, that the quarantine cases involve state efforts to limit or prevent "bads" regardless of whether they come from in or outside the state. That evenhandedness is missing in this case as in *City of Philadelphia*, and it is not supplied by the hypothetical possibility, unexplored on this record, that the state might try to use its environmental protection laws to deal with the intrastate shipment or storage of spent nuclear fuel.

Though it may seem superfluous to consider whether the Spent Fuel Act is also unconstitutional under the supremacy clause, we shall do so in order to assist the Supreme Court should it decide to review this case and in doing so disagree with our analysis of the commerce

clause issue. Such a discussion may also assist the Court in deciding whether to review the case at all, in the event that review is sought and the Court agrees with us that federal jurisdiction exists and was properly exercised.

The Atomic Energy Act, 42 U.S.C. §§ 2011 *et seq.*, sets up a comprehensive scheme of federal regulation of atomic energy, administered by the Nuclear Regulatory Commission. The Act does not refer explicitly to spent nuclear fuel, but it does refer to the constituents of that fuel, see 42 U.S.C. §§ 2014(e), (z), (aa); 10 C.F.R. § 72.3(v); and the state does not, and could not, see 42 U.S.C. §§ 2073, 2111, question the Commission's authority to regulate the storage of spent nuclear fuel. Pursuant to that authority the Commission recently issued detailed regulations for the licensing of storage facilities—both at the reactor site and, as in the case of the Morris facility, away from the reactor site—for spent nuclear fuel. See 10 C.F.R. Part 72 (1981). These regulations forbid the acquisition, receipt, or possession of spent nuclear fuel for storage except under license from the Commission; and again its authority to require licensing is unquestioned. The Morris facility was licensed under an earlier set of regulations, 10 C.F.R. Part 70 (1980), and its license is up for renewal under the new regulations (Part 72, *supra*), see 45 Fed. Reg. 74698-99 (1980), but the validity of its license is not challenged.

The regulations, however, say nothing about shipment across state lines; and, curiously, there is no copy of the license for the Morris facility in the record, so that we do not know whether it expressly authorizes the receipt of spent nuclear fuel from other states. Although no one suggests that General Electric may be violating the license by receiving interstate shipments of spent nuclear fuel for storage at the Morris facility, it appears that neither the Act, the regulations under the Act, nor the license itself expressly authorizes such receipt—though there are some very broad hints in the regulations that it is authorized. See 10 C.F.R.

§§ 70.42(b)(5), 71.5. But this hardly matters. *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), aff'd without opinion, 405 U.S. 1035 (1972), holds that the Atomic Energy Act, in the words of a subsequent Supreme Court decision, "created a pervasive regulatory scheme, vesting exclusive authority to regulate the discharge of radioactive effluents from nuclear power plants in the [NRC], and pre-empting the States from regulating such discharges." *Train v. Colorado Public Interest Research Group*, 427 U.S. 1, 16 (1976). The analysis of the structure and legislative history of the Act in *Northern States* compels the conclusion that the Act equally preempts state regulation of the storage, and shipment for storage, interstate and intrastate alike, of spent nuclear fuel.

We do not think the State of Illinois would quarrel with anything we have said thus far on the issue of preemption. Its argument rather is that Congress, by passing and later amending section 116 of the Clear Air Act, 42 U.S.C. § 7416, has authorized the state to nullify the Commission's exercise of authority, presumably even to the extent of shutting down the Morris facility completely. Section 16 provides that "nothing in this Act shall preclude or deny the right of any State . . . to adopt or enforce . . . any requirement respecting control or abatement of air pollution." And "air pollution" is defined in the Clean Air Act Amendments of 1977 (amending section 302(g) of the Clean Air Act, 42 U.S.C. § 7602(g)) as including any "radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air." Since source material, special nuclear material, and byproduct material are the principal constituents of spent nuclear fuel, section 116 read in light of the amended section 302(g) appears to authorize the states to regulate air pollution caused by facilities such as that at Morris. But it does not, we believe, authorize the Spent Fuel Act.

Section 16 of the Clean Air Act qualifies federal powers only under that act. It does not purport to limit

federal powers under other statutes, such as the Atomic Energy Act, under which the Morris facility was licensed. At least that is what section 16 says, although an argument can be made from the legislative history that Congress intended to allow the states to adopt stricter standards than those imposed by the NRC under the Atomic Energy Act. See H. Rep. No. 294, 95th Cong., 1st Sess. 43 and n.8 (1977); *Consolidated Edison Co. of N.Y., Inc.*, 7 N.R.C. 31, 34 and n.13 (1978); *Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n*, 659 F.2d 903, 927 (9th Cir. 1981). But even so, for this expansive view of section 16 to be applicable to the Spent Fuel Act there would have to be some basis for regarding the Act as a measure for controlling (radioactive) air pollution; and we cannot find any. The Act places no limitation on the amount of radioactive emissions from the Morris facility or from shipments to the facility. And while one effect of the Act may be to reduce those emissions by eliminating interstate shipments to the facility, that is not enough to make the Act a rational pollution-control measure, especially when, for aught that appears, the facility emits no radioactivity into the air. We cannot believe that Congress in promulgating the Clean Air Act Amendments meant the states to have carte blanche to enact any statutes, and promulgate any regulations, that might as a side-effect reduce the amount of radioactive emissions in the state, regardless of how much the statute or regulation disrupted the federal atomic energy program, which includes as we have noted a program for disposing of nuclear wastes. That would be too much to read into those amendments.

The district court's judgment in No. 81-2768 and its order denying the state's motion to remand that case to state court are reversed, and the case is remanded to the district court with instructions to remand it to the state court where it began. The judgment in No. 81-2778 is

affirmed. The parties shall bear their own costs in this court.

So ORDERED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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Appendix 2

United States Constitution, Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Appendix 3

United States Constitution
Article I, Section 8

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Appendix 4

United States Constitution
Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Appendix 5

Section 274 of Atomic Energy Act of 1954, as Amended

§ 2021. Cooperation with States

(a) Purpose

It is the purpose of this section—

(1) to recognize the interests of the States in the peaceful uses of atomic energy, and to clarify the respective responsibilities under this chapter of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials;

(2) to recognize the need, and establish programs for, cooperation between the States and the Commission with respect to control of radiation hazards associated with use of such materials;

(3) to promote an orderly regulatory pattern between the Commission and State governments with respect to nuclear development and use and regulation of byproduct, source, and special nuclear materials;

(4) to establish procedures and criteria for discontinuance of certain of the Commission's regulatory responsibilities with respect to byproduct, source, and special nuclear materials, and the assumption thereof by the States.

(5) to provide for coordination of the development of radiation standards for the guidance of Federal agencies and cooperation with the States; and

(6) to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable.

(b) Agreements with States

Except as provided in subsection (c) of this section, the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission under subchapters V, VI, and VII of this chapter, and section 2201 of this title, with respect to any one or more of the following materials within the State—

(1) byproduct materials;

(2) source materials;

(3) special nuclear materials in quantities not sufficient to form a critical mass.

During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.

(c) Commission regulation of certain activities

No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of—

(1) the construction and operation of any production or utilization facility;

(2) the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;

(3) the disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;

(4) the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

Notwithstanding any agreement between the Commission and any State pursuant to subsection (b) of this section, the Commission is authorized by rule, regulation, or order to require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of such product except pursuant to a license issued by the Commission.

(d) Conditions

The Commission shall enter into an agreement under subsection (b) of this section with any State if—

(1) The Governor of that State certifies that the State has a program for the control of radiation hazards adequate to protect the public health and safety with respect to the materials within the State covered by the proposed agreement, and that the State desires to assume regulatory responsibility for such materials; and

(2) the Commission finds that the State program is compatible with the Commission's program for the regulation of such materials, and that the State program is adequate to protect the public health and safety with respect to the materials covered by the proposed agreement.

(e) Publication in Federal Register; comment of interested persons

(1) Before any agreement under subsection (b) of this section is signed by the Commission, the terms of the proposed agreement and of proposed exemptions pursuant to subsection

(f) of this section shall be published once each week for four consecutive weeks in the Federal Register; and such opportunity for comment by interested persons on the proposed agreement and exemptions shall be allowed as the Commission determines by regulation or order to be appropriate.

(2) Each proposed agreement shall include the proposed effective date of such proposed agreement or exemptions. The agreement and exemptions shall be published in the Federal Register within thirty days after signature by the Commission and the Governor.

(f) Exemptions

The Commission is authorized and directed, by regulation or order, to grant such exemptions from the licensing requirements contained in subchapters V, VI, and VII of this chapter, and from its regulations applicable to licensees as the Commission finds necessary or appropriate to carry out any agreement entered into pursuant to subsection (b) of this section.

(g) Compatible radiation standards

The Commission is authorized and directed to cooperate with the States in the formulation of standards for protection against hazards of radiation to assure that State and Commission programs for protection against hazards of radiation will be coordinated and compatible.

(h) Consultative, advisory and miscellaneous functions of Administrator of the Environmental Protection Agency

The Administrator of the Environmental Protection Agency shall consult qualified scientists and experts in radiation matters, including the President of the National Academy of Sciences, the Chairman of the National Committee on Radiation Protection and Measurement, and qualified experts in the field of biology and medicine and in the field of health physics. The Special Assistant to the President for Science and Technology, or his designee, is authorized to attend meetings with,

participate in the deliberations of, and to advise the Administrator. The Administrator shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with States. The Administrator shall also perform such other functions as the President may assign to him by Executive order.

(i) Inspections and other functions; training and other assistance

The Commission in carrying out its licensing and regulatory responsibilities under this chapter is authorized to enter into agreements with any State, or group of States, to perform inspections or other functions on a cooperative basis as the Commission deems appropriate. The Commission is also authorized to provide training, with or without charge, to employees of, and such other assistance to, any State or political subdivision thereof or group of States as the Commission deems appropriate. Any such provision or assistance by the Commission shall take into account the additional expenses that may be incurred by a State as a consequence of the State's entering into an agreement with the Commission pursuant to subsection (b) of this section.

(j) Reserve power to terminate or suspend agreements

The Commission, upon its own initiative after reasonable notice and opportunity for hearing to the State with which an agreement under subsection (b) of this section has become effective, or upon request of the Governor of such State, may terminate or suspend its agreement with the State and reassert the licensing and regulatory authority vested in it under this chapter, if the Commission finds that such termination or suspension is required to protect the public health and safety.

(k) State regulation of activities for certain purposes

Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

(l) Commission regulated activities; notice of filing; hearing

With respect to each application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to subsection (c) of this section, the Commission shall give prompt notice to the State or States in which the activity will be conducted of the filing of the license application; and shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.

(m) Limitation of agreements and exemptions

No agreement entered into under subsection (b) of this section, and no exemption granted pursuant to subsection (f) of this section, shall affect the authority of the Commission under section 2201(b) or (i) of this title to issue rules, regulations, or orders to protect the common defense and security, to protect restricted data or to guard against the loss or diversion of special nuclear material. For purposes of section 2201(i) of this title, activities covered by exemptions granted pursuant to subsection (f) of this section shall be deemed to constitute activities authorized pursuant to this chapter; and special nuclear material acquired by any person pursuant to such an exemption shall be deemed to have been acquired pursuant to section 2073 of this title.

(n) Definition

As used in this section, the term State means any State, Territory, or possession of the United States, the Canal Zone, Puerto Rico, and the District of Columbia.

Appendix 6

Spent Fuel Act

SPENT NUCLEAR FUEL

230.21. Spent nuclear fuel defined

§ 1. For the purposes of this Act, "spent nuclear fuel" means the irradiated energy source that is permanently removed from the core of a nuclear fission reactor either because it can no longer effectively sustain a chain reaction due to the depletion of fissionable isotopes and the buildup of by-products that interferes with the chain reaction or because safety or operating concerns dictate such removal.

P.A. 81-1516, Art. II, § 1, eff. Dec. 3, 1980.

230.22. Foreign spent nuclear fuel—Disposal or storage facilities—Reciprocity agreements

§ 2. No person may dispose of, store, or accept any spent nuclear fuel which was used in any power generating facility located outside this State, or transport into this State for disposal or storage any spent nuclear fuel which was used in any power generating facility located outside this State, unless the state of origin of such spent nuclear fuel has a facility, which is not part of a power generating facility, for the disposal or storage of spent nuclear fuel substantially like that of this State and has entered into a reciprocity agreement with this State. The determination as to whether the state of origin has a disposal or storage facility for spent nuclear fuel substantially like that of this State is to be made by the Director of the Department of Nuclear Safety and all reciprocity agreements must be approved by a majority of the members of both Houses of the General Assembly and approved and signed by the Governor.

P.A. 81-1516, Art. II, § 2, eff. Dec. 3, 1980.

230.23. Fines and penalties

§ 3. Any person who violates any provision of this Act shall be liable to a civil penalty of not to exceed $10,000 for each violation and an additional civil penalty of not to exceed $1,000 for each day during which violation continues.

P.A. 81-1516, Art. II, § 3, eff. Dec. 3, 1980.

230.24. Injunction—Violations

§ 4. The State's Attorney in a county where a violation occurs or Attorney General may institute a civil action for immediate injunction to halt any activity which is in violation of this Act.

P.A. 81-1516, Art. II, § 4, eff. Dec. 3, 1980.

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